ELECTRONICALLY FILED JUN 08, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1276

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID J. TREPTOW,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
THE HONORABLE KELLYANN LEKAR, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

The defendant, David J. Treptow, pleaded guilty to possessing marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d), failure to affix a drug tax stamp in violation of Iowa Code section 453B.12, and gatherings where controlled substances were used enhanced as a second or subsequent offense in violation of Iowa Code sections 124.407 and 124.411. He agreed to a 12-year sentence with no mandatory minimum. The State had charged him with six crimes and various enhancements. If convicted as charged, he faced at least a 203-year maximum and 39-year mandatory minimum sentence. On appeal, he tries to turn his favorable plea deal into an even better deal by attacking the factual basis for the gathering charge. If he wins, the remedy is to vacate his plea, so he will face 203-years in prison again. But this Court should dismiss the appeal because it lacks authority to decide appeals from guilty pleas or address ineffectiveness claims.

Course of Proceedings and Facts

Police responded to a domestic disturbance call at the defendant's residence. Mins. Test. (5/1/2019) at 8; C.App.11. The defendant and his roommate were arguing over the defendant's failure to pay rent. *Id.*; C.App.11. They lived in separate rooms. *See id.* at 8, 12; C.App.11, 15.

Inside, police immediately noticed the smell of marijuana. *Id.* at 8; C.App.11. They found marijuana and paraphernalia littered throughout the house. *Id.*; C.App.11. They also found methamphetamine and the prescription drug Diazepam. *Id.* at 8, 13, 34; C.App.11, 16, 37. Police called a K9 unit to the house. *Id.* at 9; C.App.12. While outside, Koda pulled his handler to a backpack against the house and alerted. *Id.* at 16; C.App.19 Police found two large bags of marijuana inside and an address book filled with the defendant's handwriting. *Id.* at 13, 14; C.App.16, 17. All told, police found nearly a kilogram of marijuana at the residence. *Id.* at 14, 34; C.App.17, ___.

The State charged the defendant with six Counts:

1. possessing marijuana with intent to deliver within 1,000 feet of a school and park as a habitual offender and as a second or subsequent offense,
2. failing to affix a drug tax stamp as a habitual offender,

3. possessing meth within 1,000 feet of a school and park as a habitual offender and as a third or subsequent offense,

4. possessing Diazepam within 1,000 feet of a school or park as a habitual offender and as a third or subsequent offense,

5. gathering where meth was unlawfully used as a habitual offender and as a second or subsequent offense, and

6. gathering where marijuana was unlawfully used as a second or subsequent offense.

Trial Info.; App.4. He faced at least a 203-year maximum sentence with a 39-year mandatory minimum if convicted as charged and the sentences were run consecutively.[1]

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[1] The State arrived at the maximum sentence as follows. Count 1 had a 15-year base as a habitual offender. Iowa Code § 902.9(1)(c); Trial Info at 1; App.4. The second or subsequent offense enhancement could triple those 15 years. Iowa Code § 124.411(1); *State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998) (per curiam); Trial Info. at 1; App.4. The enhancement for possessing with intent to deliver within 1,000 feet of a school added 5 years for a total of 50 years (15 x 3 + 5). Iowa Code § 124.401A; Trial Info. at 1; App.4. Counts 3, 4, and 5 all had 15-year base terms as a habitual offender charges and all three could be tripled as second or subsequent offenses for three more 45-year terms (15 x 3). Iowa Code §§ 124.411(1), 902.9(1)(c); Trial Info. at 2–5; App.5–8. Count 2 had a 15-year term as a habitual offender charge. Iowa Code § 902.9(1)(c); Trial Info. at 2; App.5. Count 6 had a 1-year maximum as a serious misdemeanor tripled as a second or subsequent offense (3 x 1). Iowa Code §§ 124.407(2)(b), 124.411, 903.1(1)(b); Trial Info. at 5–6; App.8–9. So: 50 + 45 + 45 +45 + 15 +3 = 203 years.

The State arrived at the mandatory minimum as follows. Counts 1, 3, 4, and 5 were all habitual offender charges with 3-year mandatory minimums tripled as subsequent offenses for 4, 9-year minimums. Count 2 had a 3-year minimum as a habitual offender charge. So: 9 + 9 + 9 + 9 + 3 = 39 years.

The defendant agreed to plead guilty to Counts 1, 2, and 6, but only Count 6 would be enhanced. Tr. Plea Hr'g, 8:24 to 10:5. The parties agreed the sentences would run consecutively for a 12-year sentence with no mandatory minimum. *Id.* The defendant entered an *Alford*[2] plea on those three charges. *Id.* at 20:19 to 22:14.

He elected immediate sentencing. *Id.* at 23:11–15. The district court informed him that he had the right to file a motion in arrest of judgment but "[if] we proceed with sentencing right now, there will be no opportunity for you to file that document, and therefore, you would have to forever give up your right to challenge the validity of your guilty plea either before this Court or before an Appellate Court." *Id.* at 24:12–25. The defendant acknowledged he understood that right and waived it. *Id.* at 24:25 to 25:4. The district court sentenced him according to the plea and entered judgment. *Id.* at 27:10 to 28:10; J. & Sentence (7/16/2019); App.11. The defendant timely appealed. Notice Appeal (7/25/2019); App.16. He did not request permission to appeal or otherwise try to show good cause.

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

ARGUMENT

I. This Court should dismiss the defendant's appeal because Iowa Code sections 814.6 and 814.7 deprive it of jurisdiction, and the defendant has not shown good cause to appeal.

Motion to Dismiss

There is no right to a direct appeal from a guilty plea or to raise ineffectiveness claims on direct appeal in cases in which judgment was entered after July 1, 2019. Iowa Code §§ 814.6, 814.7; *see State v. Trane*, 934 N.W.2d 447, 464 (Iowa 2019); *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019). Here, the defendant pleaded guilty, and judgment was entered on July 16, 2019. J. & Sentence (7/16/2019); App.11. This Court therefore lacks authority to hear his claims and should dismiss them. *See* Iowa Code §§ 814.6, 814.7.

Had the defendant shown good cause, he could have appealed. Iowa Code § 814.6(1)(a)(3). But he did not do so for two reasons: (1) the reasons he provides to show good cause are insufficient, and (2) he did not use the proper procedure to show good cause.

A. Iowa Code section 814.6's language and purpose require interpreting "good cause" narrowly to mean exceptional circumstance. The defendant has not shown such circumstances here.

The defendant argues that this Court should construe "good cause" broadly to encompass any non-frivolous claim attacking a

guilty plea. Defendant Br. at 58–61. But section 814.6's language and legislative history support a narrow construction requiring exceptional circumstances in which a defendant's guilty plea claim is likely meritorious and cannot be raised in another forum. *See* Iowa Code § 814.6(1).

First, section 814.6's language and structure support construing good cause narrowly. Good cause is an exception to the rule preventing appeals from guilty pleas. This Court should interpret 814.6 to mean that most guilty-plea appeals fall within the no-appeal rule, not the good cause exception. *See* Iowa Code § 814.6(1)(a). That means interpreting good cause narrowly. Plus, section 814.6 allows defendants to seek discretionary review from an order denying a motion in arrest of judgment. *Id.* at 814.6(2)(f). Interpreting good cause to mean non-frivolous claims as the defendant suggests would render section 814.6(2)(f) superfluous, which this Court should not do. *See Town of Mechanicsville v. State Appeal Bd.*, 111 N.W.2d 317, 320 (Iowa 1961) ("A cardinal rule of statutory construction is that, if reasonably possible, effect should be given every part of a statute.").

Second, legislative history[3] shows that section 814.6's purpose is to reduce wasteful appeals from guilty pleas. The Senate floor manager of Senate File 589—which enacted section 814.6—explained during floor debate that "good cause" means "extraordinary circumstances where the system has failed the defendant, for example where there was a complete failure of the defense counsel, [or the] court interfered with the plea process or improperly induced a plea of actual innocence." Senate Floor Debate, SF589 (Amendment S-3212), April 25, 2019, 3:25:30–3:26:00 p.m. The Senator further explained that this provision, along with other changes related to guilty-plea appeals in SF589, "limits frivolous appeals, saves the state resources, and also resolves cases at the district court level…." *Id.* Constructing good cause narrowly furthers that goal.

Here, the defendant argues that he established good cause to appeal because his plea to "gatherings where controlled substances

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[3] The State maintains that considering statements by legislators during floor debate is generally inappropriate and unhelpful in deciding disputes over legislative intent. After all, the statement of an individual legislator is just that—the statement of an individual legislator. Nonetheless, the State recognizes that this Court has recently looked to the recorded videos of floor debates when attempting to determine legislative intent. *See State v. Ortiz*, 905 N.W.2d 174, 180 (Iowa 2017); *State v. Doe*, 903 N.W.2d 347, 354 (Iowa 2017).

were unlawfully used … lack[ed] a factual basis." Defendant Br. at 64. But that is just the merits of his appeal. He offers nothing unique about his claim to show good cause. He is not denied review because he can bring this challenge as an ineffectiveness claim in a post-conviction-relief action. And declining to decide the defendant's appeal is not unfair because he knew the elements of the charge, what the record said, and what he had actually done before he pleaded guilty and waived his right to file a motion in arrest of judgment. *See* Tr. Plea Hr'g, 8:2–14, 15:20 to 20:7. He has not shown good cause.

B. The defendant did not use the proper procedure to seek review.

By filing a notice of appeal and attempting to prove good cause in a merits brief, the defendant failed to comply with the requirement to establish good cause to appeal. Section 814.6 allows appeals from guilty pleas "in a case where the defendant establishes good cause." Iowa Code § 814.6(1)(a)(3). That drafting makes establishing good cause a predicate to an appeal. Here, the defendant has appealed but not shown good cause. He had no right to appeal.

Instead, the defendant needed to request permission to appeal by filing a document in which he attempted to show good cause. *See id*. Such a procedure would be akin to applying for discretionary

review, petitioning for certiorari, seeking a writ, or obtaining a certificate of appealability. The State could resist and this Court would decide whether to allow the appeal. Such a procedure implements section 814.6's requirement that a defendant who pleads guilty establish good cause in order to have a right to appeal.

It also furthers the statutory goal to conserve resources by limiting appeals from guilty pleas. By resolving most guilty-plea cases at the application stage, counsel for both parties will not need to file briefs and the Court will only need to screen—not conduct full merits review of—most cases. In contrast, allowing appeals and deciding good cause at the merits-briefing stage guts the efficiency gained by preventing guilty-plea appeals.

* * *

Establishing good cause requires showing exception circumstances. The defendant has not shown them here. And he followed the wrong procedure by appealing before showing good cause. This Court should dismiss his appeal.

II. Neither section 814.6 nor section 814.7 violates the United States or Iowa constitutions.

Preservation of Error

The defendant did not challenge either section 814.6 or section 814.7 in the district court. Nonetheless, the State does not contest error preservation.

Standard of Review

Constitutional questions are reviewed de novo. *State v. Newton*, 929 N.W.2d 250, 254 (Iowa 2019).

Merits

The defendant attacks section 814.6's prohibition on appeals following guilty pleas and section 814.7's prohibition on deciding ineffective-assistance claims on direct appeal. Defendant Br. at 34–57; Iowa Code §§ 814.6, 814.7, 814.29. He raises three constitutional challenges to both statutes: (A) they improperly curtail appellate jurisdiction, violating separation of powers, Defendant Br. at 34–44; (B) they "violate equal protection," *id.* at 44–52; and (C) they "deny [him] due process and the right to effective counsel on appeal," *id.* at 52–57. The State takes each argument in turn.

A. Neither section 814.6 nor section 814.7 violates separation of powers by improperly limiting appellate jurisdiction.

The Iowa Constitution establishes the Supreme Court as a tribunal for the correction of errors at law, "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. Art. V, § 4. Consistent with the text of the Iowa Constitution, the Supreme Court has repeatedly held that appellate jurisdiction in Iowa is "statutory and not constitutional." *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991). Indeed, "[t]he right of appeal is not an inherent or constitutional right. The Legislature may give or take it away at its pleasure." *Van Der Burg v. Bailey*, 223 N.W. 515, 516 (Iowa 1929).

To that end, "when the Legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and neither court nor judge may modify these rules without express statutory authority, and then only to the extent specified." *Home Sav. & Tr. Co. v. Dist. Court*, 95 N.W. 522, 524 (Iowa 1903). In other words, "the power is clearly given to the General Assembly, to

restrict this appellate jurisdiction." *Lampson v. Platt*, 1 Iowa 556, 560 (1855) (comma omitted).[4]

Being "purely statutory," the grant of "appellate review is … subject to strict construction." *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 614 (Iowa 1976). Absent a statute authorizing an appeal, this Court cannot acquire jurisdiction by an appeal. *See Crowe v. De Soto Consol. Sch. Dist.*, 66 N.W.2d 859, 860 (Iowa 1954) ("It is our duty to reject an appeal not authorized by statute."). Such authorizing statutes can be modified, and the authority to hear a particular class of appellate cases "may be granted or denied by the legislature as it determines." *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). Under Iowa's constitutional structure, the role of the judiciary is to decide controversies, but the

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[4] *Lampson* involved interpretation of a materially identical predecessor provision in the 1846 Constitution. The only difference between the 1846 and 1857 provisions is that commas were added to set off "by law," as follows: "shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe." Iowa Const. Art. V, § 3 (1846). These commas did not change the provision's meaning.

And if there was any lingering question about a potential change in meaning over time, it is relevant that the Court's territorial analogue also had its jurisdiction "limited by law." *See United States ex rel James Davenport & Pet. for Mandamus to Cty. Commissioners of Dubuque Cty.*, Bradf. 5, 11 (Iowa Terr. 1840), 1840 WL 4020.

General Assembly is the arbiter of which "avenue of appellate review is deemed appropriate" for a particular class of cases. *See Shortridge v. State*, 478 N.W.2d 613, 615 (Iowa 1991), *superseded by statute on other grounds.*

These holdings show that the legislative branch in Iowa possesses nearly unbounded authority to regulate the taking of appeals at law. *See, e.g. James*, 479 N.W.2d at 290; *State v. Olsen*, 162 N.W. 781, 782 (Iowa 1917); *State v. Johnson*, 2 Iowa 549, 549 (1856). Because the source of the Supreme Court's authority to decide criminal appeals is through acts of the General Assembly, not the Constitution, it necessarily follows that legislation in this area is consistent with the separation of powers.

To the extent the foregoing does not dispose of the question, a trip through Iowa's history confirms the propriety of the amendment to sections 814.6 and 814.7. For almost two-hundred years, the General Assembly has been active in this area, repeatedly adding to or subtracting from the Supreme Court's appellate jurisdiction:

- **From 1838 into the early years of statehood**, the Territorial Legislature and General Assembly authorized the Supreme Court to hear writs of error for non-capital criminal defendants "as a matter of course" (essentially authorizing appeals), whereas the Court only had authority to hear writs in capital cases upon "allowance"

of a Judge of the Supreme Court (akin to modern discretionary review). *See* Iowa Code § 3088, 3090–91 (1851); Iowa Code ch. 47, §§ 76–77 (Terr. 1843); Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839).

- **In the late 19th and into the 20th Century,** the General Assembly authorized a somewhat convoluted system of appellate review related to various incarnations of mayoral, police, justice of the peace, superior, municipal, circuit, and district courts. As a general matter, the district court had authority to hear all appeals from inferior tribunals, often as a trial anew. *See, e.g.*, Iowa Code § 6936 (1919) (district court had original and appellate jurisdiction of criminal actions), § 9241 (1919) ("trial anew" for appeals from justice court); § 161 (1873) (district court had original and appellate jurisdiction of criminal actions). The criminal decisions of the district court were then in turn reviewable by the Supreme Court. *E.g.*, Iowa Code § 9559 (1919); Iowa Code § 4520 (1873).

- **From approximately 1924 until 1971**, the General Assembly granted the Supreme Court authority to review "by appeal" "any judgment, action, or decision of the district court in a criminal case," for both indictable and non-indictable offenses. *See* Iowa Code § 793.1 (1966) (all criminal cases); § 762.51 (1966) (non-indictable); ch. 658, § 13994 (1924) (all criminal cases); ch. 627, § 13607 (1924) (non-indictable).

- **In 1972**, the General Assembly established the modern unified court system and stripped the Supreme Court of authority to review non-indictable criminal cases, other than by discretionary review. *See* 1972 Iowa Acts, ch. 1124 (64th Gen. Assem., 2nd Sess.); *id.* § 73.1 ("No judgment of conviction of a nonindictable misdemeanor … shall be appealed to the supreme court except by discretionary review as provided herein."); *id.* § 275 (amending 793.1); *id.* § 282 (repealing 765.51). The General Assembly also entirely stripped the Court of authority to engage in

appellate review of acquittals in non-indictable cases. *Id.* § 73.1.

- **In 1979,** following substantial revisions throughout the criminal portions of the Code, the General Assembly granted the appellate courts authority to hear appeals from all "final judgment[s] of sentence," but again denied the Supreme Court authority to decide appeals from simple-misdemeanor and ordinance-violation convictions absent discretionary review. Iowa Code § 814.6 (1979).

- **In 2019**, the General Assembly has stripped the appellate courts of authority to decide appeals following a guilty plea for non-Class A felonies. *See* 2019 Iowa Acts ch. 140, § 28 (88th Gen. Assem.).

Senate File 589 is the latest in a long line of jurisdiction-stripping and jurisdiction-conferring statutes. Like the earlier legislation, SF589 variously strips and grants jurisdiction from the appellate courts pursuant to the General Assembly's prerogative to regulate appellate jurisdiction. *See* Iowa Const. Art. V, § 4. This is the separation of powers contemplated by the Iowa Framers.

The defendant does not substantively confront the language of Article V, section 4 that permits the General Assembly to "restrict[]" appellate jurisdiction. Instead, he says that Article V, section 4 allows the legislature to provide "limit[s] on the manner of the Court's jurisdiction." Defendant Br. at 39. But that conflates Article V, sections 4 and 6. As already noted, Article V, section 4 allows the

legislature to "prescribe" "restrictions" on "appellate jurisdiction," while Article V, section 6 gives district courts jurisdiction over criminal and civil matters "in such manner as prescribed by law." The defendant offers no explanation of why "in such manner" means the same things as "under such restrictions." *Compare id.* Art. V, § 6, *with id.* Art. V, § 4. Nor does he grapple with the differing jurisdictional grants. Because the defendant conflates the jurisdictional grants to Iowa's appellate courts, his analysis lacks force.

That error extends to his reliance on *Matter of Guardianship of Matejski*, 419 N.W.2d 576, 577 (Iowa 1988). He says that *Matejsk* means that the legislature "cannot deprive the courts of their jurisdiction." Defendant Br. at 39. But *Matejski* is about whether the district court had authority to order a sterilization in the absence of legislation expressly granting or denying that authority. *Matejski*, 419 N.W.2d at 576–80. No statute removed such cases from the district court's jurisdiction, so *Matejski* does not apply here. Plus, the Court analyzed district court jurisdiction under Article V, section 6 of the Iowa Constitution, not Supreme Court jurisdiction under Article V, section 4. As explained, those grants are different. The Iowa

Constitution gives the legislature different authority over each type of jurisdiction. The defendant errs by conflating the provisions.

In sum, the amendments to section 814.6 and 814.7 are exactly the kind of "restrictions … the general assembly may, by law, prescribe." Iowa Const. Art. V, § 4. The statute does not offend separation of powers.

B. Neither section 814.6 nor section 814.7 violates equal protection.

1. Section 814.6 draws rational lines between differently situated individuals, so it does not violate equal protection.

The defendant's equal protection argument attacking section 814.6 has two fatal defects. First, he ignores that a person who admits guilt is not similarly situated to a person who asserts innocence and demands trial. Defendant Br. at 48. Second, he asserts without any supporting authority or argument that removing the ability to appeal a guilty plea is a fundament right. *Id.* at 50.

First, the defendant notes he is in a group of defendants who pleaded guilty as compared to those who went to trial. Defendant Br. at 47–48. He does not really argue these groups are similarly situated. *Id.* Had he, the argument would fail. "A plea of guilty … is itself a conviction." *State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000)

(quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). In other words, "a guilty plea implicitly eliminates any question of the defendant's guilt." *State v. Mann*, 602 N.W.2d 785, 789 (Iowa 1999). This is the opposite of a trial whose purpose is to decide the question of guilt. Pleading guilty waives all the constitutional protections associated with trial. Thus, Iowa law has long recognized that "[a] guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further possibilities." *Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982) (internal citation and quotation marks omitted). The defendant who pleads guilty is not similarly situated to the defendant who is convicted at trial. That the defendant is not similarly situated to those who stand trial defeats his claim eliminating the need for scrutiny analysis. *Nguyen v. State*, 878 N.W.2d 744, 758 (Iowa 2016) (quoting *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009)).

Second, the defendant's assertion that the statute triggers strict scrutiny is wrong under existing case law. Existing caselaw shows that there is no right to a criminal appeal under the United States or Iowa constitutions, much less a fundamental right. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal

Constitution to provide appellate courts or a right to appellate review at all."); *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991) ("In Iowa the right of appeal is statutory and not constitutional."); *Van Der Burg v. Bailey*, 223 N.W. 515, 516 (Iowa 1929) ("The right of appeal is not an inherent or constitutional right."). There is no fundamental right at issue.

Even if there were a fundamental right to some manner of post-judgment review for all guilty pleas, the statutory scheme of Senate File 589 does not infringe upon that interest. The same claims that could be raised before July 1, 2019, can still be raised after—just through different procedures. While the defendant may not obtain appellate review through a notice of appeal following a guilty plea absent good cause, he can still apply for discretionary review, file a petition for writ of certiorari, file a motion to correct an illegal sentence (and subsequently file a petition for writ of certiorari seeking appellate review of the same), or file a postconviction action (and subsequently file a notice of appeal seeking review of the same). "[E]very relevant case has made it clear that a change in the number of tribunals authorized to hear a litigant's arguments does not implicate the litigant's substantive rights." *Santos v. Guam*, 436 F.3d

1051, 1056 (9th Cir. 2006) (Wallace, J., concurring) (collecting cases). In other words, a litigant has no right, much less a fundamental right, to present a particular claim in a particular tribunal. *Id.*

If this Court conducts scrutiny review, rational basis applies because no fundamental right is implicated. Thus, the inquiry shifts to whether there is a rational basis for lines drawn by the statute. There is.

The first line drawn by section 814.6(1)(a) is between persons who plead guilty and persons who assert they are not guilty and are only convicted after trial. This distinction is rational for many of the same reasons that establish that a criminal offender who pleads guilty is not similarly situated to an offender who demands trial. For example, pleas waive a variety of claims and are intended to a put "lid on the box," not serve as a "a platform from which to explore further possibilities." *Kyle*, 322 N.W.2d at 304. Pleas also serve as a conviction, "eliminat[ing] any question of the defendant's guilt." *Mann*, 602 N.W.2d at 789; *see LaRue*, 619 N.W.2d at 397. This distinction passes muster.

The second line drawn by the statute is between guilty pleas to Class A felonies and pleas to other crimes. A distinction based on the

grade of offense is not new. For example, the Supreme Court has lacked authority to review simple-misdemeanor convictions for decades. *See* Iowa Code § 814.6 (1979). Similarly, the Court's rules distinguish between the guilty-plea procedures afforded to misdemeanants versus felons. *See* Iowa R. Crim. P. 2.8(2)(b). And indigent defendants get two lawyers in Class A felony cases but only one in other cases. Iowa Code § 815.10(1)(b). The General Assembly could rationally believe that extra procedural safeguards were needed to review Class A guilty pleas because such convictions result in life sentences without parole. This distinction also passes muster.

Finally, the defendant does not acknowledge that various restrictions on the ability to appeal guilty-plea convictions exist elsewhere in the country, either by statute or court rule. *See* Cal. Penal Code § 1237.5 (2019); Kan. Stat. Ann. § 22-3602 (2019); Md. Code Ann., Cts. & Jud. Proc. § 12-302(e)(2); Fla. R. App. P. 9.140(b)(2); Ill. S.Ct. R. 604(d); Okla. Ct. Crim. App. R. 4.2; Tex. R. App. P. 25.2(a)(2). The defendant has not cited any case, from any of those jurisdictions or any other, accepting his equal protection argument. *See* Defendant Br. at 44–52. The statute is not constitutionally infirm.

2. Section 814.7 treats everyone the same: no one can raise ineffective assistance on direct review.

The defendant argues that section 814.7 violates equal protection because he "may not get relief on direct appeal and must instead pursue postconviction relief." Defendant Br. at 49. He says that treats him differently than defendants who preserved error. *See id.* But that isn't so. Section 814.7 prevents all defendants from raising claims of ineffective assistance on direct appeal. Treating people equally does not offend equal protection.

Moreover, this claim is subject to rational-basis review because raising ineffective-assistance on direct appeal is not a fundamental right. *See Varnum*, 763 N.W.2d at 879–80 (providing rational-basis review for most equal protection challenges); *see also Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (no constitutional right to appeal); *State v. Hinners*, 471 N.W.2d 841, 843 (Iowa 1991) (same). It is rational to treat preserved error differently from unpreserved error. Doing so encourages timely objections before the trial court and gives the court a chance to resolve them.

Accepting the defendant's argument that it violates equal protection to treat preserved error differently from unpreserved error requires overruling two important legal concepts. First, it would

functionally end error preservation. After all, courts could not treat unpreserved error differently than preserved error without violating equal protection. Second, it would overrule *Strickland v. Washington*, 466 U.S. 668 (1984), because the ineffective-assistance framework puts more onerous burdens on defendants raising ineffectiveness claims than defendants with preserved error. This Court should decline to hold that both it and the United States Supreme Court have been violating equal protection for decades.

C. Neither section 814.6 nor section 814.7 violates due process or the right to counsel.

The defendant asserts that Iowa Code section 814.6 and section 814.7 violate due process. Defendant Br. at 52. He seems to think that is so because both, but especially Iowa Code 814.7, violate his right to counsel on appeal. *Id.* at 54.

But the statutes do not deprive the defendant of counsel at any stage of his criminal proceeding. He had counsel below and has counsel now. Moreover, he can still challenge his counsel's performance in a PCR action. If he does, he will have counsel. Iowa Code § 822.5. And he can appeal the trial court's decision if needed. *Id.* at § 822.9.

He worries a PCR action might not conclude before he discharges his sentence. Defendant Br. at 56. But that could be true of a direct appeal. And as long as the defendant attacks his conviction in a PCR action, discharging his sentence will not moot his claim. *See Homan v. Branstad*, 864 N.W.2d 321, 328 (Iowa 2015) (stating mootness turns on whether a decision "would be of force and effect"). The defendant's fear that district judges will not follow Iowa Rule of Criminal Procedure 2.8(2)(b) if sections 814.6 and 814.7 stand suggests district judges are lawless. But that is not so. Iowa district courts faithfully attempt to apply and follow the law.

To the extent the defendant makes a distinct due-process argument, it fails. The United States Supreme Court has held that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin*, 351 U.S. at 18. Surely if a state could eliminate appellate review for criminal convictions altogether, there is no right to appellate review following a plea of guilty or to raise ineffective-assistance claims on direct appeal. And the Iowa Supreme Court has said: "In Iowa the right of appeal is statutory and not constitutional." *Hinners*, 471 N.W.2d at 843. Neither statute violates due process.

III. Even if the defendant's plea to the gatherings charge lacked a factual basis, he cannot prove he would not have pleaded guilty absent the error.

Preservation of Error

The defendant failed to preserve error on his claim that his plea lacked a factual basis. During his plea colloquy, he elected immediate sentencing and therefore filed no motion in arrest of judgment. Tr. Plea Hr'g, 23:11 to 25:4. His "failure to challenge the adequacy of [his] guilty plea proceeding by motion in arrest of judgment shall preclude [his] right to assert such challenge on appeal." Iowa R. Crim. P. 2.24(3)(a). He therefore cannot raise this claim.

He counters that the district court failed to "adequately inform [him] regarding his duty to file a motion in arrest of judgement to challenge the defects in the guilty plea." Defendant Br. at 71. But the district court told him "[i]f we proceed with sentencing right now, there will be no opportunity for you to file [a motion in arrest of judgment], and therefore, you would have to forever give up your right to challenge the validity of your guilty plea either before this Court or before an Appellate Court." Tr. Plea Hr'g, 24:21–25. That advisory compares favorably to other advisories that passed muster. *State v. Taylor*, 301 N.W.2d 692, 692 (Iowa 1981) (finding advisory

adequate when a district court told the defendant that by selecting immediate sentencing "you waive your right to question the legality of [your] plea of guilty. In other words, if we sentence you immediately that right is gone"); *see also, e.g.*, *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006) (concluding district court adequately advised defendant about motion in arrest of judgment when it told defendant he had to "file a paper that we call a Motion in Arrest of Judgment" if he wanted to "appeal or challenge" whether the court "follow[ed] all of the correct procedures in taking your guilty plea"); *State v. Sedlock*, No. 15–1954, 2016 WL 5930883 at *1 and n.1 (Iowa Ct. App. 2016) (finding defendant's waiver of the right to file a motion in arrest of judgment effective when he "acknowledged-that if he did not file a timely motion in arrest of judgment 'I give up this right and forever waive my right to challenge this plea and to appeal my plea'").

The defendant complains that the district court did not explain "what would constitute an invalid plea." *Id.* at 72. But it did not need to. Iowa appellate courts have found effective waiver of the right to file a motion in arrest of judgment when the court explained the defendant could not attack the validity of his plea but did not explain what constitutes an invalid plea. *Taylor*, 301 N.W.2d at 692; *Sedlock*,

2016 WL 5930883 at *1. Nor does he point to a rule requiring such explanation.

Finally, the defendant attempts to circumvent his failure to file a motion in arrest of judgment by relying on ineffective assistance of counsel. Defendant Br. at 65–66. But this Court lacks authority to consider his ineffectiveness claim on direct appeal. Iowa Code § 814.7.

Standard of Review

This Court reviews challenges to guilty pleas for correction of errors at law. *State v. Fisher*, 877 N.W.2d 676, 680 (Iowa 2016).

Merits

The defendant argues that: (A) his plea to "gatherings where controlled substances used" lacks "a factual basis," (B) this Court should adopt plain error, and (C) the remedy for the factual basis problem is to vacate only the gathering count of the plea. Defendant Br. at 64, 76–84, 84–90. The State takes his arguments in turn.

A. Iowa Code section 814.29 prevents the defendant from obtaining relief because he has not shown that he "more likely than not would not have pled guilty if the defect had not occurred."

The defendant says his plea to the gatherings charge lacks a factual basis. Defendant Br. at 67–70. Even if he is correct, Iowa Code section 814.29 prevents him from obtaining relief.

Section 814.29 provides: "If a defendant challenges a guilty plea based on an alleged defect in the plea proceedings, the plea shall not be vacated unless the defendant demonstrates that the defendant more likely than not would not have pled guilty if the defect had not occurred." Iowa Code § 814.29. But the defendant would still have pled guilty absent the defect. The State charged him with six counts and various enhancements. If the sentences were run consecutively on those charges, he faced at least a 203-year maximum sentence and a 39-year mandatory minimum sentence. *See* State Br. at n. 1. The most severe penalty standing alone was a 50-year maximum and 9-year mandatory minimum. *Id.* Yet his plea provided for a 12-year sentence with no mandatory minimum. Tr. Plea Hr'g, Tr. Plea Hr'g, 8:24 to 10:5. He received an exceptional deal. Even had he realized the marijuana gathering charge lacked a factual basis, he would have pled guilty. *Cf.* Iowa Code § 814.29.

Despite his burden to prove he would not have pled guilty, the defendant hardly tried to do so. *See id.* He says that absent the error, "[t]he outcome of the proceeding would be different because the district court shall not accept a guilty plea which lacks a factual basis." Defendant Br. at 88. But that is not the test. He must prove he "more

likely than not would not have pled guilty if the defect had not occurred." Iowa Code § 814.29. That the defendant cannot prove. He failed to carry his burden, so his claim fails.

The defendant asserts that section 814.29 violates separation of powers because it "essentially makes a defect in a guilty plea unreviewable on direct appeal." Defendant Br. at 42. He says that "is particularly problematic for the Court's inherent jurisdiction." *Id.* He does not explain what inherent jurisdiction is, and the State is not sure.

In any event, as explained in division II.A, the Iowa Legislature can restrict appellate jurisdiction. Plus, the defendant's claim is reviewable in a post-conviction-relief action to the extent it relies on ineffective assistance and by an application for discretionary review to the extent it does not. Perhaps most fundamentally, the Iowa Constitution does not provide that Iowa's appellate courts must be able to review all claims attacking the merits of a guilty plea on direct appeal. Section 814.29 does not violate separation of powers.

The defendant also argues that "[h]istorically, Iowa has not applied" section 814.29's "approach when analyzing errors resulting from a lack of factual basis." Defendant Br. at 85. True enough. But

section 814.29 changed the law. The defendant says that the Iowa Supreme Court has eschewed section 814.29's approach for "policy" reasons. *Id.* at 86 (citing *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996)). But the elected representatives comprising the General Assembly, not appellate courts, set policy in Iowa. *E.g.*, *State v. Wagner*, 596 N.W.2d 83, 88 (Iowa 1999) ("Once the legislature has spoken, the court's role is to give effect to the law as written, not to rewrite the law in accordance with the court's view of the preferred public policy."); *In re Disinterment of Body of Jarvis*, 58 N.W.2d 24, 27 (Iowa 1953) ("The legislature, and not this court, declares the public policy of this state." (quoting *State v. Bruntlett*, 36 N.W.2d 450, 460 (Iowa 1949))). Moreover, the legislature can establish the elements of, and limits on, legal claims as it has done here. *State v. Williams*, 910 N.W.2d 586, 590 (Iowa 2018); *Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 359–60 (Iowa 2014).

The defendant pleaded guilty to three counts and secured a 12-year sentence with no mandatory minimum. As charged, he faced at least a 203-year maximum and a 39-year mandatory minimum. Because he cannot prove he would have rejected this plea deal had he

known the record lacked a factual basis on his gathering charge, he cannot obtain relief. *See* Iowa Code § 814.29.

B. This Court should continue to reject plain error review.

The defendant invites this Court to adopt plain error. Defendant Br. at 76–84. But Iowa Courts "do not subscribe to the plain error rule …, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point." *E.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (citing *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997)). The defendant has not satisfied the "highest possible showing" required to overcome stare decisis. *See State v. Brown*, 930 N.W.2d 840, 854 (Iowa 2019) ("From the very beginnings of this court, we have guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." (quoting *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 249 (Iowa 2018))). This Court should decline his invitation.

C. If this Court grants the defendant relief, the correct remedy is to vacate the entire plea.

The defendant lists "two possible remedies" when a count in a guilty plea lacks a factual basis: (1) dismiss the charge if no factual

basis could be shown, or (2) remand to allow the State to establish a factual basis. Defendant Br. at 89. But the defendant omits the correct remedy from his "possible remedies." In a case like this one in which the State dismisses multiple charges and declines to pursue various enhancements in exchange for a plea but one charge lacks a factual basis, the remedy is to "vacate all [] convictions and the entire plea bargain and remand the case to the district court." *State v. Ceretti*, 871 N.W.2d 88, 97 (Iowa 2015) (citing *State v. Allen*, 708 N.W.2d 361, 369 (Iowa 2006) and *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996)). That means, "[o]n remand, the State may reinstate any charges dismissed in contemplation of a valid plea bargain, if it so desires, and file any additional charges supported by the available evidence." *Id.*

As this Court has acknowledged, a defendant cannot turn a favorable plea deal into an even better deal on appeal by attacking a charge to which he pleaded guilty while preserving the rest of the deal. *Id.* That is what this defendant is doing. If he "wins" the merits of his claim, this Court should vacate his plea and return him to square one, where he faced at least a 203-year maximum with a 39-year mandatory minimum sentence.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss the defendant's appeal.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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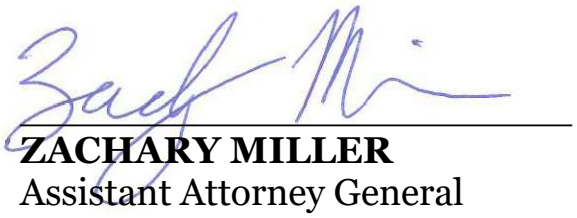

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